Hong Kwi Seong v Ganad Media Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-2869 OF 2010
LOW HOP BING, ABU SAMAH AND APANDI ALI JJCA
15 JUNE 2012

Civil Procedure — Appeal — Appeal against judgment of High Court — Setting aside of two committal orders and warrants of committal — Money judgment and examination order — Non-appearance for examination — Order for payment — No appeal against payment order and no payment made on due dates — Leave to issue committal proceedings — Whether non-payment of money judgment can be punished with contempt of court — Whether High Court judge correct in dismissing application to set aside committal orders and warrants of committal

The present appeals concerned the decision of the High Court in dismissing with costs the appellant's motions to set aside two committal orders and warrants of committal. After obtaining a money judgment against the appellant ('judgment debt'), the respondent obtained an order to examine the appellant ('examination order') and when the appellant did not appear for examination, the respondent obtained an order for payment of the judgment debt in instalments ('payment order'). The appellant did not appeal against the payment order nor did it make payment on the due dates. The respondent then obtained leave to issue committal proceedings in the High Court which was followed by the committal orders for contempt of court ('committal orders'). The appellant argued that the ground on which the respondent had obtained the committal orders was the appellant's failure to pay the instalments under the payment order. Therefore, it was contended that the non-payment of a money judgment cannot be punished with contempt of court and relied on the case of *Hong Leong Bank Bhd v Phung Tze Thiam John Phung* [2008] 2 MLJ 785. The issue that arose for the court's determination was whether the learned judge of the High Court was correct in dismissing the appellant's application to set aside the committal orders and the warrants of committal.

Held, dismissing the appeal with costs:

(1) The first point in *Hong Leong Bank* which was the choice of forum was inapplicable to the instant appeal as committal proceedings were actually commenced in the High Court as the court of first instance. The facts in this appeal were distinguishable from *Hong Leong Bank*. Furthermore, the two English authorities referred to in *Hong Leong Bank* concern the construction of the crucial terms of the order. These terms ordered the plaintiff to recover the money, as in *In Re Oddy* or the plaintiff to have a

return of the shares, as in *Iberian Trust Ltd*. These orders did not require the defendant to do or refrain from doing an act, and hence, obviously, those orders could not be enforced against the defendant by way of committal for contempt (see para 9–13).

(2) The court was unable to agree with the decision of the Court of Appeal in Hong Leong Bank, that a money judgment to repay the money could not be enforced by committal proceedings. While it is true that a money judgment could be enforced pursuant to the Debtors' Act 1957, the Act does not, either expressly or by necessary implication, exclude committal proceedings in the event of a defendant's refusal or neglect to do the act within the time specified in the money judgment. The decision of the Court of Appeal in *Hong Leong Bank* did not assist the appellant in the instant appeal (see para 14).

(3) The terms of the order clearly directed the appellant to pay the judgment sum in five instalments on or before the respective dates. In other words, the appellant was directed to do an act within a specified date. Despite that, the appellant had refused or neglected to do. The terms of the order in the instant appeal were peremptory in the sense that the appellant was commanded to make payment (see para 19).

[Bahasa Malaysia summary

Rayuan-rayuan ini berhubung keputusan Mahkamah Tinggi dalam menolak usul perayu untuk mengetepikan dua perintah pengkomitan dan waran pengkomitan dengan kos. Selepas mendapatkan penghakiman wang terhadap perayu ('hutang penghakiman'), responden memperolehi perintah mahkamah untuk memeriksa perayu ('perintah pemeriksaan') dan apabila perayu tidak hadir bagi pemeriksaan, responden memperolehi suatu perintah bagi pembayaran hutang penghakiman tersebut secara ansuran ('perintah pembayaran'). Perayu tidak merayu terhadap perintah pembayaran tersebut serta tidak membuat pembayaran pada tarikh-tarikh yang ditetapkan. Responden kemudiannya memperolehi kebenaran untuk memulakan prosiding pengkomitan di Mahkamah Tinggi diikuti dengan perintah pengkomitan kerana menghina mahkamah ('perintah pengkomitan'). Perayu menghujahkan bahawa alasan responden untuk mendapat perintah pengkomitan adalah kegagalan perayu untuk membayar ansuran di bawah perintah pembayaran. Oleh itu, dihujahkan bahawa ketiadaan bayaran penghakiman wang tidak boleh dihukum dengan penghinaan mahkamah dan bersandarkan pada kes *Hong Leong Bank Bhd v Phung Tze Thiam John Phung* [2008] 2 MLJ 785. Isu yang timbul untuk penentuan mahkamah adalah sama ada hakim Mahkamah Tinggi betul dalam menolak permohonan perayu untuk mengetepikan perintah pengkomitan dan waran pengkomitan.

Diputuskan, menolak rayuan dengan kos:

(1) Hujah pertama dalam kes *Hong Leong Bank* iaitu pilihan forum tidak

terpakai kepada rayuan ini kerana prosiding pengkomitan sebenarnya bermula di Mahkamah Tinggi sebagai mahkamah permulaan. Fakta-fakta dalam rayuan ini dibezakan dengan kes *Hong Leong Bank*. Tambahan lagi, kedua-dua nas-nas Inggeris yang dirujuk dalam kes *Hong Leong Bank* adalah berkenaan pembentukan terma-terma penting dalam perintah tersebut. Terma-terma ini mengarahkan plaintif untuk mendapatkan kembali wang, seperti dalam kes *In Re Oddy* atau plaintif mempunyai pulangan saham, seperti dalam kes *Iberian Trust Ltd*. Perintah ini tidak memerlukan defendan untuk melakukan atau menahan daripada melakukan sesuatu perbuatan, dan seterusnya, jelas bahawa, perintah tersebut tidak boleh dikuatkuasakan terhadap defendan melalui pengkomitan kerana menghina mahkamah (lihat perenggan 9–13).

(2) Mahkamah tidak bersetuju dengan keputusan Mahkamah Rayuan dalam kes *Hong Leong Bank*, bahawa penghakiman wang untuk membayar balik wang tidak boleh dikuatkuasakan oleh prosiding pengkomitan. Walaupun benar bahawa suatu penghakiman wang boleh dikuatkuasakan menurut Akta Penghutang 1957, Akta tersebut tidak, sama ada secara nyata atau melalui implikasi, mengecualikan prosiding pengkomitan sekiranya defendan enggan atau cuai melakukan perbuatan tersebut dalam masa yang ditetapkan dalam penghakiman wang. Keputusan Mahkamah Rayuan dalam kes *Hong Leong Bank* tidak membantu perayu dalam rayuan ini (lihat perenggan 14).

(3) Terma-terma perintah tersebut dengan jelas mengarahkan perayu untuk membayar jumlah penghakiman dalam lima ansuran pada atau sebelum tarikh masing-masing. Dalam erti kata lain, perayu telah diarahkan untuk melakukan sesuatu perbuatan dalam tarikh yang ditetapkan. Walaupun begitu, perayu enggan atau cuai berbuat sedemikian. Terma perintah dalam rayuan ini harus dipatuhi dalam erti kata bahawa perayu telah diperintahkan untuk membuat bayaran (lihat perenggan 19).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Cases referred to

Hong Leong Bank Bhd v Phung Tze Thiam John Phung [2008] 2 MLJ 785; [2008] 4 CLJ 742, CA (refd)

Iberian Trust, Ltd v Founders Trust and Investment Co Ltd [1932] 2 KB 87, KBD (distd)

Oddy, Major, In re v Harness [1906] 1 Ch 93, CA (distd)

Appeal from: Civil Suit No S7–47 of 1995 (High Court, Kuala Lumpur)

Legislation referred to

Debtors' Act 1957
Rules of the High Court 1980 O 45 rr 1(a), 1(a)(i), 5(1)(a)(i)

Nitin Nadkarni (CS Mong with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Sharmala Batumalai (Hamzah Sulaiman & Partners) for the respondent.

Low Hop Bing JCA: (delivering judgment of the court):

APPEAL

[1] These two appeals were filed by the appellant against the decision of the High Court in dismissing with costs the appellant's motions which sought to set aside two committal orders and warrants of committal. We now give our grounds for dismissing these appeals.

FACTUAL BACKGROUND

[2] The respondent, having obtained a money judgment against the appellant ('the judgment debt'), proceeded to obtain an order to examine the appellant ('the examination order'). When the appellant did not appear for examination, the respondent obtained an order for payment of the judgment debt in instalments ('the payment order'). There was no appeal by the appellant against the payment order.

[3] The appellant did not make any payment on the due dates. The respondent then obtained leave to issue committal proceedings in the High Court, followed by the committal orders for contempt of court ('committal orders').

GROUND FOR COMMITTAL

[4] Learned counsel Mr Nitin Nadkarni (assisted by Mr CS Mong) argued that the ground on which the respondent had obtained the committal orders was the appellant's failure to pay the instalments under the payment order. They stressed that non-payment of a money judgment cannot be punished with contempt of court. They drew support from the decision of the Court of Appeal in *Hong Leong Bank Bhd v Phung Tze Thiam John Phung* [2008] 2 MLJ 785; [2008] 4 CLJ 742.

[5] Ms Sharmala Batumalai, the respondent's learned counsel, submitted that the learned judge was correct in giving the committal orders and the warrants of committal.

[6] On the basis of the above submissions, the question which we must address in this appeal is this:

> Given the above factual background, particularly in relation to the appellant's failure to pay the instalments on the due dates specified in the payment order, and having regard to the decision of the Court of Appeal in *Hong Leong Banks*', which in turn relied on in *Re Oddy, Major v Harness* [1906] 1 Ch 93 (CA); and *Iberian Trust, Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87 (HC), was the learned judge of the High Court correct in dismissing the appellant's application to set aside the committal orders and the warrants of committal?

[7] We must first consider *Hong Leong Bank Bhds'*. There, the Court of Appeal had dismissed the bank's motion for leave to commit the *Phung Tze Thiam* ('Phung') for contempt of the Court of Appeal, arising from Phung's failure or refusal to comply with an order of the Court of Appeal. The bank was Phung's employer. The bank had dismissed Phung who then complained that his dismissal was without just cause or excuse. His case was referred to the Industrial Court which found for him but awarded compensation in lieu of reinstatement. The bank applied for judicial review of the award. Phung also applied to have the award reviewed and sought reinstatement. The High Court dismissed the bank's application, and granted the reinstatement sought by Phung. The bank appealed to the Court of Appeal. In the meantime, Phung asked for all backwages which he claimed he was entitled to receive pursuant to the order of reinstatement. The bank disputed this claim. Phung then successfully moved the High Court to obtain the backwages of RM618,322.97 claimed by him. Phung threatened enforcement and the bank paid this sum. Later, on 25 April 2007, the Court of Appeal allowed the bank's appeal and ordered Phung to refund the sum paid to him less the sum of RM130,000 paid to Employees Provident Fund ('EPF'). The refund was to be made within 30 days of the order of the Court of Appeal. Phung did not comply. Hence, the bank's motion for leave to commit Phung for contempt of the Court of Appeal.

[8] The first point which led the Court of Appeal to dismiss the bank's motion appeared at p 746. It has to do with the choice of forum, and reads as follows:

> The first point we make has to do with the choice of forum. When an appeal is allowed, any judgment this court enters is enforceable not in this court but before the High Court. This is because an appeal to this court is merely a continuation of the trial and all that this court does is to review the case and enter such judgment as ought to have been entered by the High Court. So, when an appeal is allowed and a consequential order is made, for example, for the payment or refund of monies, you have to execute or enforce that judgment in the High Court, not in this court. So, if committal were to lie at all, the application to attach must be made to the High Court whose order this court reversed.

[9] With respect, the first point in *Hong Leong Bank*, is inapplicable to the instant appeal wherein committal proceedings were actually commenced in the High Court as the court of first instance. Hence, the facts in this appeal are clearly distinguishable. A

[10] Next, in *Hong Leong Bank*, the Court of Appeal dealt with the second and final ground, touching on the choice of the enforcement remedy. The passages at pp 746–747 (with emphasis added) merit reproduction as follows: B

> The second point we make has to do with the choice of the enforcement remedy. *Can the appellant enforce the order of this court directing the refund by way of committal proceedings?* In answering this question, we must bear in mind that it is only *an order that requires a party to do or refrain from doing an act that may be enforced by committal for contempt*. That much is clear from the terms of RHC O 45 r 5 which provides as follows: C
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> (1) Where: D
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> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or
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> (b) a person disobeys a judgment or order requiring him to abstain from doing an act, E
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> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say —
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> (i) with the leave of the Court, an order of committal; F
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> (ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;
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> (iii) subject to the provisions of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer. G
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> Now, in *Re Oddy, Major v Harness* [1906] 1 Ch 93 it was held by the English Court of Appeal *that 'an order to recover money is not an order on the defendants to do anything, and therefore that such order could not be enforced either by a supplementary order for the payment of the money within a fixed time or by attachment*', per Luxmoore J in *Iberian Trust, Ltd v Founders Trust and Investment Co, Ltd* [1932] 2 KB 87. *The order of 25 April 2007 in essence required the respondent to re-pay a part of the sum that had been paid to him by the appellant. In point of form, it may appear to be an order requiring the respondent to do an act, namely to refund the money*. But a court is concerned with substance and not form. And *the substance of the order under consideration here is that it is a money judgment and not a judgment requiring the performance of an act*. We must therefore answer the question we posed in para 4 of this judgment in the negative. That is to say, *the order of this court dated 25 April 2007 cannot be enforced by means of committal proceedings*. But that is not to say that the appellant bank is not without remedy. It may enforce the said order in the usual way in which money judgments are enforced. H I

[11] As alluded to above, the Court of Appeal relied on the above two English authorities and held that the bank cannot enforce the money judgment of the Court of Appeal directing the refund by way of committal proceedings, as the money judgment is not a judgment requiring the performance of an act.

[12] We shall now proceed to embark on an analysis of the aforesaid two English authorities, as follows:

(a) In *Re Oddy*;

(i) on the plaintiff's application, Buckley J made, inter alia, an order that major, the plaintiff, should recover from Harness, the defendant the sum of £1248 lls, being the loss occasioned to the trust estate after deducting certain items already paid by Harness. The defendant's motion to discharge the order was dismissed by Buckley J;

(ii) the defendant's appeal was allowed by the Court of Appeal which held that judgment for recovery by the plaintiff from the defendant of a sum of money, instead of judgment in the usual form for payment of the money to the plaintiff by the defendant, could not be supplemented by a four-day order against the defendant in default of payment within the stipulated time, or by attachment. An order for the plaintiff to recover money is not an order on the defendants to do anything. Vaughan Williams LJ said at p 98 that 'there is a manifest difference between an order for payment and an order that the plaintiff do recover';

(b) In *Iberian Trust Ltd*, the order was that the plaintiffs do have a return of the shares within 14 days. Luxmoore J felt that the form of the order was a little unfortunate as it did not define the precise steps which had to be taken to transfer the shares in question from the defendant to the plaintiff. The terms of the order were too vague and did not specify that the defendant was to return the shares. In the circumstances, the defendant did not transfer the shares to the plaintiff. In dismissing the plaintiff's application for leave to issue writs of attachment against the directors of the defendant company, His Lordship referred to *In Re Oddy*, and said at p 95 that the order did not direct the defendant to do anything; the order was that the plaintiff was to recover something from the defendant.

[13] We respectfully note that the two English authorities referred to in *Hong Leong Bank*, concern the construction of the crucial terms of the order. These terms ordered the plaintiff to recover the money, as in *In Re Oddy*; or the plaintiff to have a return of the shares, as in *Iberian Trust Ltd*. These orders did

not require the defendant to do or refrain from doing an act, and hence, obviously, those orders could not be enforced against the defendant by way of committal for contempt.

[14] On the other hand, in *Hong Leong Bank*, the terms of the order did direct Phung to refund the sum paid to him, less the sum of RM130,000 paid to EPF, and so are vastly different from the terms of the orders prevailing in the aforesaid two English authorities. With the utmost respect, we are unable to agree with the decision of the Court of Appeal in *Hong Leong Bank*, that a money judgment directing Phung to repay the money could not be enforced by committal proceedings. While it is true that a money judgment could be enforced pursuant to the Debtors' Act 1957, the Act does not, either expressly or by necessary implication, exclude committal proceedings in the event of a defendant's refusal or neglect to do the act within the time specified in the money judgment. Hence, we respectfully hold that the decision of the Court of Appeal in *Hong Leong Bank*, does not assist the appellant in the instant appeal.

[15] The specific terms of the judgment or order are of overriding importance, as they are to be construed by the court in order to determine the legal effect as to whether the defendant is required to do an act within a time specified therein and whether the defendant has refused or neglected to do so within the prescribed time in the context of O 45 r 1(a). The court will then decide whether or not to grant leave to the plaintiff to pursue an order of committal under O 45 r 1(a)(i).

[16] Reverting to the instant appeal, the terms of the order in Bahasa Malaysia at p 372 of the appeal record are translated by me (with emphasis added) as follows:

> (a) *The defendant do pay to the second plaintiff (the Respondent herein) RM245,938.27 together with interest in the sum of RM52,796.23* i e at 4% per annum with effect from 18 August 1994 until 31 December 1999 amounting to RM298,737.50; and
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> (b) *The defendant do pay to the second plaintiff RM120,001.50 together with interest in the sum of RM25J62.51, both amounting to RM145,764.01.*
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> (c) Both the payments in (a) and (b) amounting to RM444,501.51 to be made in five instalments i e RM88.900.30 on the following dates viz 1 January 2008, 1 February 2008, 1 March 2008, 1 April 2008 and 1 May 2008 respectively.

[17] The above order contains an indorsement (as translated) to the following effect:

> If you, Hong Kwi Seong, the Defendant named herein neglect to obey this order by the time therein limited to make payment amounting to RM444.501.51 in five instalments viz RM88.900 per instalment on the following dates viz 1 January 2008, 1 February 2008, 1 March 2008, 1 April 2008 and 1 May 2008, you Hong Kwi Seong will be liable to process of execution for the purpose of compelling you to obey the same.

[18] It is plain to us that the terms of the order in the instant appeal are readily distinguishable from those in *In Re Oddy*; and *Iberian Trust Ltd*.

[19] In the instant appeal, the terms of the order clearly directed the appellant to pay the judgment sum in five instalments on or before the respective dates. In other words, the appellant was directed to do an act within a specified date. Despite that, the appellant had refused or neglected to do. The terms of the order in the instant appeal are peremptory in the sense that the appellant was commanded to make payment. These terms come within the scope of O 45 r 5(1)(a)(i). We are therefore unable to sustain the submission presented for the defendant. We answer the above question in the affirmative.

CONCLUSION

[20] These appeals being devoid of merits are dismissed with costs of RM10,000 for each appeal. The two decisions of the High Court are affirmed. Deposit to the respondent on account of the fixed costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor